

Message Text

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ORIGIN L-03

INFO OCT-01 EUR-12 IO-13 ISO-00 EB-07 TRSE-00 COME-00
LAB-04 FTC-01 AID-05 CIAE-00 FRB-01 INR-07 NSAE-00
USIA-15 XMB-04 OPIC-06 SP-02 CIEP-02 SIL-01 OMB-01
NSC-05 SS-15 STR-04 CEA-01 SEC-01 JUSE-00 H-02 /113 R

DRAFTED BY L/EB:SRBOND

APPROVED BY IO:RDMOREY

EB/IFD/OIA:ECONSTABLE

TREASURY:JLANGE

COMMERCE:DARRILL

LABOR:EMEDVEC

IO/IEP:RAPOOLE

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P 110044Z DEC 76

FM SECSTATE WASHDC

TO USMISSION USUN NY PRIORITY

USMISSION OECD PARIS PRIORITY

AMEMBASSY BONN PRIORITY

UNCLAS STATE 301280

E.O. 11652: N/A

TAGS: EINV, UN, EGEN

SUBJECT: US VIEWS ON A CODE OF CONDUCT

1. THE FOLLOWING ARE US VIEWS ON A CODE OF CONDUCT AS
REQUESTED BY THE UN CENTER ON TRANSNATIONAL CORPORATIONS:
BEGIN QUOTE.

VIEWS AND PROPOSALS OF THE UNITED STATES OF AMERICA REGARD-
ING A CODE OF CONDUCT TO BE PREPARED BY THE COMMISSION ON
TRANSNATIONAL CORPORATIONS

FURTHER TO THE INVITATION EXTENDED BY THE SECRETARY-
GENERAL IN EC 111/2 (6-5), THE GOVERNMENT OF THE UNITED
STATES OF AMERICA PRESENTS ITS VIEWS AND PROPOSALS ON A
CODE OF CONDUCT TO THE INTERGOVERNMENTAL WORKING GROUP
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THROUGH THE CENTRE ON TRANSNATIONAL CORPORATIONS.

INTERNATIONAL INVESTMENT FLOWS HAVE BECOME INCREASINGLY
IMPORTANT IN TODAY'S INTERDEPENDENT GLOBAL ECONOMY. IT IS

IN THE INTEREST OF ALL NATIONS TO CREATE AN ENVIRONMENT IN WHICH ADEQUATE INTERNATIONAL INVESTMENT FLOWS WILL OCCUR TO THE BENEFIT OF ALL. WITHIN THIS FRAMEWORK, THE UNITED STATES GOVERNMENT BELIEVES THAT A VOLUNTARY CODE OF CONDUCT RELATED TO TRANSNATIONAL ENTERPRISES CAN PLAY A VALUABLE

ROLE IN ENCOURAGING THE POSITIVE CONTRIBUTIONS THESE ENTERPRISES CAN MAKE TO ECONOMIC GROWTH AND DEVELOPMENT AND MINIMIZING AND RESOLVING DIFFICULTIES WHICH MAY ARISE IN CONNECTION WITH THEIR OPERATIONS.

TRANSNATIONAL CORPORATIONS, AS THE PRIMARY VEHICLES BY WHICH FOREIGN INVESTMENT IS CARRIED OUT AND TECHNOLOGY IS TRANSFERRED, ARE VITAL INSTRUMENTS FOR GROWTH IN BOTH INDUSTRIALIZED AND DEVELOPING COUNTRIES. THE GROWTH IN PRIVATE DIRECT INVESTMENT FROM 1960-1975 HAS BEEN SUBSTANTIAL, ALTHOUGH THE RATE OF INCREASE HAS MODERATED IN RECENT YEARS. THE ACTIVITIES OF MULTINATIONAL ENTERPRISES HAVE PROVIDED A MAJOR IMPULSE TO DEVELOPMENT INTERNATIONALLY. THE BENEFITS DERIVED FROM THE UNIQUE PACKAGING OF CAPITAL, TECHNOLOGY, MARKETING AND MANAGERIAL SKILLS PROVIDED BY TNCS HAVE, HOWEVER, IN SOME INSTANCES, BEEN ACCCOMPANIED BY PROBLEMS FROM THE POINT OF VIEW OF CONCERNED GOVERNMENTS.

OBJECTIVES OF A CODE OF CONDUCT

THE UNITED STATES BELIEVES THAT AN AREA OF CONSENSUS AMONG DEVELOPED AND DEVELOPING STATES IN REGARD TO THE ACTIVITIES OF TNCS DOES EXIST AND THAT A CODE REFLECTING THIS CONSENSUS CAN SERVE TO INCREASE HARMONIOUS COOPERATION AMONG ALL STATES, TO THEIR MUTUAL BENEFIT. THE VERY ACT OF REACHING AGREEMENT ON SUCH AREAS WOULD, BY ITSELF, BE A POSITIVE STEP. IT WOULD REDUCE EXISTING MISUNDERSTANDINGS ABOUT TNC OPERATIONS WHICH CAN CREATE FRICTIONS AMONG STATES, AND DISCOURAGE INVESTMENT AND RELATED ACTIVITIES OF TNCS ESSENTIAL FOR DEVELOPMENT. IMPROVED UNCLASSIFIED

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COOPERATION AMONG STATES ON INVESTMENT ISSUES AND BETWEEN INVESTORS AND GOVERNMENTS SHOULD BE OF PARTICULAR INTEREST TO DEVELOPING COUNTRIES, GIVEN THE CONCERN ABOUT THE ADEQUACY OF INVESTMENT CAPITAL OVER THE SHORT AND LONG TERM, AND THE APPARENT RECENT TENDENCY FOR DIRECT INVESTMENT FLOWS TO EXPAND MORE RAPIDLY IN THE DEVELOPED STATES THAN IN THE DEVELOPING COUNTRIES. IN THIS REGARD, THE US BELIEVES THAT INDIVIDUAL GOVERNMENTS WILL CONTINUE TO PLAY THE KEY ROLE IN CREATING AN ATTRACTIVE INVESTMENT CLIMATE.

SOME MULTINATIONALS, LIKE SOME DOMESTIC ENTERPRISES, HAVE ON OCCASION ENGAGED IN INAPPROPRIATE OR UNACCEPTABLE

BEHAVIOR. HOWEVER, NOT ALL OF THESE CONTROVERIES AND PROBLEMS RELATED TO TNCS ARISE FROM THE ACTIVITIES OF THE CORPORATIONS. PROBLEMS ALSO ARISE FROM ACTIONS ON THE PART OF HOME OR HOST GOVERNMENTS IN REGARD TO TNCS WHICH RAISE CONCERNs OR ISSUES WITH OTHER GOVERNMENTS. SO TOO,

A TNC MAY BE SUBJECT TO CONTRADICTORY POLICIES OR EVEN LEGISLATION BY DIFFERENT COUNTRIES ASSERTING JURISDICTION OVER THE ENTERPRISE. IN SUCH CIRCUMSTANCES, THE CONCERNED GOVERNMENTS THEMSELVES MUST RESOLVE THEIR DIFFERENCES. A CODE OF CONDUCT CAN AND SHOULD ADDRESS ITSELF TO THOSE ISSUES BY CONTAINING PROVISIONS DIRECTED TO GOVERNMENTS WHICH SET OUT PRINCIPLES ON THE BASIS OF WHICH THE CONCERNED GOVERNMENTS WOULD ENDEAVOR TO RESOLVE THEIR DIFFERENCES.

BUT A CODE OF CONDUCT SHOULD NOT ONLY ENDEAVOR TO RESOLVE "PROBLEMS" ARISING FROM THE ACTIVITIES OF TNCS AND GOVERNMENTS. IT SHOULD ALSO ADDRESS ITSELF TO THE ISSUE OF HOW TO CREATE AN INTERNATIONAL CLIMATE CONDUCIVE TO PROVIDING MAXIMUM OPPORTUNITY FOR TNCS TO CONTRIBUTE TO ECONOMIC DEVELOPMENT. IN THIS CONTEXT, THE UNITED STATES BELIEVES THAT PARAS - 26-34 DO NOT GIVE SUFFICIENT RECOGNITION TO THIS ESSENTIAL PURPOSE OF A CODE. (ALL REFERENCES ARE TO PARAGRAPH NUMBERS IN DOCUMENT E/C 10/17, "TRANSNATIONAL CORPORATIONS: ISSUES INVOLVED IN THE FORMULATION OF A CODE OF CONDUCT".)

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SCOPE OF A CODE

A CODE OF CONDUCT SHOULD RECOMMEND SUCH GENERAL PRINCIPLES FOR MNE ACTIVITIES AS HAVE RECEIVED THE ACCORD OF GOVERNMENTS. AN ENTERPRISE WILL THEREAFTER HAVE A CLEARER UNDERSTANDING OF WHAT IS EXPECTED OF IT BY GOVERNMENTS. A BALANCED CODE SHOULD MAKE CLEAR TO ENTERPRISES THE LEGITIMATE EXPECTATIONS THEY CAN HAVE WITH REGARD TO THE BEHAVIOR OF GOVERNMENTS TOWARD THEM. A CODE WOULD ALSO SERVE AS A STATEMENT OF WHAT GOVERNMENTS WOULD EXPECT OF EACH OTHER.

THE UNITED STATES THEREFORE BELIEVES THAT THE PURPOSE OF A CODE IS NOT TO "REGULATE" THE BEHAVIOR OF THE ENTITIES COVERED BY IT, AS STATED IN PARA 26, BUT RATHER TO INFLUENCE SUCH BEHAVIOR BY SETTING FORTH BASIC PRINCIPLES UNIVERSALLY SUPPORTED BY GOVERNMENTS TO WHICH GOVERNMENTS AND ENTERPRISES CAN REFER AND BY WHICH THEY CAN ASCERTAIN THE LEGITIMATE EXPECTATIONS EACH HAS OF THE OTHERS' BEHAVIOR

AT THIS STAGE THE MOST EFFECTIVE MEANS OF EXERCISING REGULATION OVER TNCS IS VIA NATIONAL LEGISLATION. A SUPRA-NATIONAL REGULATORY SCHEME COVERING THE BROAD RANGE OF TNC ACTIVITIES BASED ON A BINDING CODE OF CONDUCT IS

NEITHER PRACTICAL NOR FEASIBLE NOW AND AN EFFORT TO REACH SUCH A RESULT COULD ITSELF BECOME AN AREA OF CONTENTION AMONG STATES. FURTHERMORE, CONSENSUS ON A GENERAL VOLUNTARY CODE WOULD NOT PRECLUDE THE NEGOTIATION OF BINDING ARRANGEMENTS ON CERTAIN SPECIFIC ISSUES. IN THIS REGARD,

WORK IS ALREADY GOING FORWARD ON A PROPOSED CONVENTION TO DEAL WITH THE PROBLEM OF ILLICIT PAYMENTS.

IN ORDER THAT A CODE OF CONDUCT TRULY FACE ALL ISSUES RELATED TO TNCS, IT MUST DEAL WITH THE FULL RANGE OF ENTITIES WITH PRODUCTION OR SERVICE FACILITIES IN MORE THAN ONE COUNTRY. IT MUST COVER ENTERPRISES OWNED PRIVATELY, BY GOVERNMENTS, OR BY A COMBINATION OF THE TWO; ENTERPRISES BASED IN COUNTRIES WITH A CAPITALIST, SOCIALIST OR ANY OTHER KIND OF SYSTEM. THE UNITED STATES THEREFORE BASICALLY SUPPORTS THE WORKING DEFINITION CONTAINED IN PARA 47, BUT NOTES THAT NOTWITHSTANDING PARA 48, PRINCIPLES ADDRESSED TO TNCS MUST ALSO BE CONSIDERED AS UNCLASSIFIED

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BEING ADDRESSED TO DOMESTIC ENTERPRISES WHERE THE PRINCIPLES ARE RELEVANT SO AS TO AVOID AN UNFAIRLY DISCRIMINATORY DOUBLE STANDARD.

NECESSARY ELEMENTS OF A CODE

THE UNITED STATES HAS NOT ENDEAVORED TO ADDRESS ITSELF IN THIS DOCUMENT TO ALL OF THOSE ISSUES RAISED IN E/C 10/17. HOWEVER, THE FOLLOWING ARE U.S. COMMENTS ON SOME OF THE KEY ISSUES.

ALL GOVERNMENTS SHOULD RECOGNIZE THAT COUNTRIES ARE ENTITLED TO REGULATE THE OPERATIONS OF TNCS WITHIN THEIR JURISDICTION, SUBJECT TO INTERNATIONAL LAW AND TO THE INTERNATIONAL AGREEMENTS TO WHICH THEY HAVE SUBSCRIBED. THEY SHOULD EXPECT TNCS TO RESPECT APPLICABLE LAWS AND THE SOVEREIGNTY OF THE NATIONS IN WHICH THEY OPERATE AND TO REFRAIN FROM UNLAWFUL INTERFERENCE IN THE DOMESTIC AFFAIRS OF HOST COUNTRIES. UNACCEPTABLE POLITICAL ACTIVITIES SHOULD BE CLEARLY DELINEATED IN LAW. THIS IS THE BEST WAY OF AVOIDING PROBLEMS WHICH OFTEN END UP AS INTER-GOVERNMENTAL PROBLEMS.

THE UNITED STATES DOES NOT BELIEVE THAT THE PROPOSITION ADVANCED IN PARA 69 THAT HOST COUNTRY LAWS AUTOMATICALLY SHOULD HAVE PRECEDENCE OVER THE LAWS OF THE HOME OR OTHER COUNTRIES IS SOUND. THE ISSUE OF CONFLICT OF LAWS AND OF JURISDICTIONS IS ONE OF GREAT COMPLEXITY. THERE ARE CONFLICT OF LAWS RULES IN MANY COUNTRIES THAT RECOGNIZE THAT MATTERS LINKED TO MORE THAN ONE JURISDICTION ARE NOT NECESSARILY SUBJECT TO THE LAWS OF ONLY ONE OF THE

JURISDICTIONS CONCERNED. SO TOO, IN CASES WHERE ENTERPRISES ARE SUBJECT TO CONFLICTING COMMANDS UNDER THE LAWS OF DIFFERENT STATES, THE CONFLICT CANNOT BE RESOLVED BY THE ENTERPRISES ITSELF AND TO DEFINE THE PROBLEM ONLY BY REFERRING TO THE RESPONSIBILITIES OF THE ENTERPRISE IS NOT

RESPONSIVE TO THE ISSUE. RATHER, THE STATES CONCERNED SHOULD COOPERATE TO FIND A SOLUTION.

TNCS CANNOT ACT IN A VACUUM. COOPERATION WITH GOVERNMENTS
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IS TO THE MUTUAL ADVANTAGE OF BOTH. THEREFORE, THE UNITED STATES ATTACHES IMPORTANCE TO THE CONCEPT THAT TNCS MAY MAINTAIN SUCH LEGITIMATE CONTACTS WITH GOVERNMENTS AS ARE REASONABLE TO MAKE THEIR VIEWS KNOWN ON ISSUES AFFECTING THEM. SUCH CONTACTS DO NOT CONSTITUTE INTERFERENCE IN THE INTERNAL AFFAIRS OF A STATE.

TNCS SHOULD ALSO TAKE FULLY INTO ACCOUNT ESTABLISHED POLICIES OF HOST COUNTRIES AND GIVE DUE REGARD TO HOST COUNTRIES' ECONOMIC AND SOCIAL AIMS AND PRIORITIES, INCLUDING THOSE RELATED TO DEVELOPMENT, EMPLOYMENT PRACTICES AND TECHNOLOGY.

A CODE OF CONDUCT SHOULD CONTAIN PROVISIONS AIMED AT ENSURING FAIR TREATMENT OF ENTERPRISES WHICH IS THE SUREST WAY TO FACILITATE AND MAXIMIZE THE BENEFITS BROUGHT BY TNCS. THE UNITED STATES BELIEVES, THEREFORE, THAT IT IS ESSENTIAL TO STATE IN A CODE OF CONDUCT THAT GOVERNMENTS SHOULD TREAT TNCS EQUITABLY, IN A NON-DISCRIMINATORY FASHION, AND IN ACCORDANCE WITH INTERNATIONAL LAW; THAT RELEVANT LEGISLATION, REGULATIONS AND POLICIES SHOULD BE EASILY UNDERSTANDABLE, PUBLICLY AVAILABLE, AND APPLIED PREDICTABLY AND EQUITABLY, AND THAT THEY SHOULD BE MAINTAINED WITH REASONABLE CONSISTENCY. WHEN THERE ARE CHANGES IN LAWS OR POLICIES AND/OR THEIR IMPLEMENTATION, SUCH CHANGES SHOULD BE CARRIED OUT WITH FULL REGARD FOR EXISTING RIGHTS WHERE CONTRACTUAL AND OTHER LEGAL OBLIGATIONS ARE AFFECTED. BOTH GOVERNMENTS AND ENTERPRISES SHOULD RESPECT THE CONTRACTUAL OBLIGATIONS INTO WHICH THEY FREELY ENTER.

A LEGAL AND ECONOMIC INFRASTRUCTURE SHOULD BE ESTABLISHED IN EACH COUNTRY WHICH WOULD ENCOURAGE, FACILITATE AND MAXIMIZE THOSE ACTIVITIES OF TNCS WHICH HOST COUNTRIES DESIRE IN ORDER TO HELP FULFILL THEIR DEVELOPMENT OBJECTIVES. AN IMPORTANT ASPECT OF THIS WOULD BE TO ESTABLISH AND GUARANTEE RIGHTS IN REGARD TO PROTECTION OF INDUSTRIAL PROPERTY RIGHTS, REPATRIATION OF PROFITS, ROYALTIES AND DISINVESTMENT, AS WELL AS THE RIGHT TO PROMPT, ADEQUATE AND EFFECTIVE COMPENSATION WHERE THE PROPERTY OF A TNC IS EXPROPRIATED. REASONABLE COMPETITION PRINCIPLES ARE

ALSO IMPORTANT IN THIS CONTEXT.

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FINALLY, IT SHOULD BE RECOGNIZED AS INEVITABLE THAT,
ON OCCASION, THE POLICIES AND LAWS OF GOVERNMENTS WILL BE
IN CONFLICT AND THAT THE TNC WILL BE SUBJECT TO

CONTRADICTORY REQUIREMENTS. A CODE SHOULD ENCOURAGE CONSULTATIONS BETWEEN THE CONCERNED GOVERNMENTS IN SUCH INSTANCES. WHERE THE CONFLICT IS ONE BETWEEN A TNC AND A HOST GOVERNMENT, WITH INTERNATIONAL IMPLICATIONS, A CODE SHOULD ENCOURAGE THE UTILIZATION OF PROCEDURES WHICH WOULD DE-POLITICIZE THE CONTROVERSY AS FAR AS POSSIBLE, SUCH AS BY THE USE OF NEUTRAL, PRE-ESTABLISHED DISPUTE SETTLEMENT OR FACT-FINDING MECHANISMS. THE ASSURANCE OF A MEANS OF NEUTRAL DISPUTE SETTLEMENT WOULD BE THE STRONGEST POSSIBLE INCENTIVE TO FOREIGN INVESTMENT.
END QUOTE.

2. FOR USUN: PLEASE DELIVER ABOVE TO THE AMBASSADOR SAHLGREN AT UN CENTER ON TNCS.

3. FOR OECD PARIS: IN KEEPING WITH THE AGREEMENT AT NOVEMBER 9-10 MEETING OF CIME, PLEASE DELIVER TEXT TO OECD SECRETARIAT FOR CIRCULATION TO OTHER CIME MEMBERS.
PLEASE ASK SECRETARIAT TO INQUIRE WHEN OTHER CIME DELEGATES PLAN TO SHARE THEIR VIEWS.

4. FOR BONN: PLEASE GIVE TEXT TO CIME CHAIRMAN ABRAMOWSKI ROBINSON

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<< END OF DOCUMENT >>

Message Attributes

Automatic Decaptioning: X
Capture Date: 16 SEP 1999
Channel Indicators: n/a
Current Classification: UNCLASSIFIED
Concepts: STANDARDS, FOREIGN MARKETS, TEXT, INTERNATIONAL ORGANIZATIONS, BUSINESS FIRMS, FOREIGN INVESTMENTS
Control Number: n/a
Copy: SINGLE
Draft Date: 11 DEC 1976
Decaption Date: 01 JAN 1960
Decaption Note:
Disposition Action: n/a
Disposition Approved on Date:
Disposition Authority: n/a
Disposition Case Number: n/a
Disposition Comment:
Disposition Date: 01 JAN 1960
Disposition Event:
Disposition History: n/a
Disposition Reason:
Disposition Remarks:
Document Number: 1976STATE301280
Document Source: ADS
Document Unique ID: 00
Drafter: L/EB:SRBOND
Enclosure: n/a
Executive Order: N/A
Errors: n/a
Film Number: D760457-0690
From: STATE
Handling Restrictions: n/a
Image Path:
ISecure: 1
Legacy Key: link1976/newtext/t19761293/baaaeqyp.tel
Line Count: 305
Locator: TEXT ON-LINE, TEXT ON MICROFILM
Office: ORIGIN L
Original Classification: UNCLASSIFIED
Original Handling Restrictions: n/a
Original Previous Classification: n/a
Original Previous Handling Restrictions: n/a
Page Count: 6
Previous Channel Indicators:
Previous Classification: n/a
Previous Handling Restrictions: n/a
Reference: n/a
Review Action: RELEASED, APPROVED
Review Authority: schwenja
Review Comment: n/a
Review Content Flags:
Review Date: 08 JUN 2004
Review Event:
Review Exemptions: n/a
Review History: RELEASED <08 JUN 2004 by hattaycs>; APPROVED <16 AUG 2004 by schwenja>
Review Markings:

Margaret P. Grafeld
Declassified/Released
US Department of State
EO Systematic Review
04 MAY 2006

Review Media Identifier:
Review Referrals: n/a
Review Release Date: n/a
Review Release Event: n/a
Review Transfer Date:
Review Withdrawn Fields: n/a
Secure: OPEN
Status: NATIVE
Subject: US VIEWS ON A CODE OF CONDUCT
TAGS: EINV, EGEN, UN
To: USUN NY
OECD PARIS
BONN
Type: TE
Markings: Margaret P. Grafeld Declassified/Released US Department of State EO Systematic Review 04 MAY 2006